In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

A. O. ANDERSON & COMPANY, Claimant of 1974 CASES OF CANNED SALMON LABELED IN PART, "Hypatia Brand Pink Salmon" SHIPPED BY ALASKA HERRING & SARDINE CO. CANNERY,
Defendant in Error.

No. 3899

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

HON. EDWARD E. CUSHMAN, *Judge*

BRIEF OF DEFENDANT IN ERROR

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STATEMENT

The statement of the case made by counsel for the Plaintiff in Error is incomplete. It is fairly accurate so far as it goes but it omits important

facts and the testimony in support thereof. The statement purports to set forth substantially the testimony of each witness who testified for the Government but fails to include certain portions of the testimony of such witnesses that has a persuasive, if not controlling influence upon a proper determination of this controversy. No chemical or bacteriological examinations were made of any of the cans of salmon examined by the witnesses on the part of the Government. The examinations made by these witnesses were trade examinations. The tests made were by the sense of smell of such witnesses, all of whom had been employed in the United States Bureau of Chemistry for many years. All of these witnesses testified that a chemical or bacteriological examination is not usually applied by the Bureau of Chemistry in the examination of salmon for the determination of its purity or adulteration. The witness, A. W. Hansen, examined 384 cans taken from 384 cases. He testified that he found 71 tainted cans, or a percentage of 18.4 per cent. (B. Ex. 35). The other witnesses only examined 240 cans taken from 240 cases and testified that they found a percentage of tainted cans of from 17.9 to 20 per cent. (Brief p. 10).

The cans of salmon were selected by the Gov-

ernment witness E. A. McDonald. Mr. McDonald testified that one Monroe was present at the selection of the samples, representing the claimant (B. Ex. p. 28), but nowhere does it appear that Monroe agreed that the samples selected were representative of the entire parcel of 1974 cases. The cans examined by the Government witnesses were divided into parcels of 12 cans and the result of the examination disclosed that the quantity of tainted cans in such parcels of 12 varied to a considerable degree, the last dozen showing no taint of any kind. (B. Ex. p. 36). The testimony of the other witnesses on behalf of the Government was substantially to the same effect. The following question was asked the witness Hansen upon cross-examination:

"Q. The point that I am getting at is this: The Bureau of Chemistry has arbitrarily fixed a standard for tainted goods as to what will be allowed to go into commerce and what will not be allowed to go into commerce? I mean by this that they have established in the case of salmon a standard that any parcel of salmon may be permitted to go into commerce if the tainted cans or stale cans do not exceed ten percent?"

The attorney for the Government said:

"We object to that. We are not insisting upon any standard." (B. Ex. p. 40).

The witness Hansen further testified that the Bureau of Chemistry has passed parcels of salmon that ran from five or six per cent, and stated that the highest percentage of adulterated salmon that had been passed by the Bureau of Chemistry into the trade was probably about six per cent.

The witness Balcom testified that the Bureau of Chemistry had allowed salmon to go into the trade where the percentage of adulterated salmon was around ten per cent. He says:

"When we first began the examination of this canned salmon in large quantities, there was such a large percentage of it on the market that was in very bad condition that merely as an administrative policy we had to adopt some rule as to where we should bring an action and where we should let the matter go—and for a time there was a certain limit, somewhere around ten per cent. That was several years ago; and the reasons for that—for the percentage being so high at that time, were various. I will mention perhaps two. One was that we didn't know so much about the business then as we do now, but the principal one was that there was such large quantities of salmon on the market that were so much worse than ten per cent, that we considered that the best we could do with our limited funds and personnel was to get those parcels off the market that were worse than ten per cent. If we succeeded in doing that at that time, we were doing mighty well." (B. Ex. p. 70.)

All of the witnesses for the Government stated that they were unable to specify any instance of

illness, sickness or death resulting from the eating of adulterated salmon such as those in controversy here. (B. Ex. pp. 37-45-67.) The witnesses for the Government further stated that any ordinary person possessing the ordinary sense of smell could as easily detect tainted salmon when the can was opened as the experts of the Government. (B. Ex. pp. 55-66-67.) All of the witnesses agreed in the view that the eating of salmon such as examined here was not injurious to human health. The following question was propounded to Dr. Balcom on cross-examination:

"Q. Now, Doctor, in the conduct of your business in the Bureau of Chemistry, you don't and can't undertake to literally say that nothing shall go, in the way of food product, into interstate commerce, unless it is entirely free from decomposed matter, can you?

"A. I don't believe that would be an administrative possibility.

"Q. It would be a practical impossibility?

"A. Yes.

"Q. —to literally construe that law, wouldn't it?

"A. I think so; yes, sir.

"Q. Therefore, the Bureau of Chemistry, in recognition of the fact, have made, without possibly fixing any definite standard—they have allowed and daily allow food products to go into interstate commerce that are more or less tainted or bad or defective cans, is that so?

"A. They have to make some rules for administrative guidance, and of course realizing that it is useless to make or adopt rules for their guidance that cannot be upheld as a practical matter, and, necessarily, they have to adopt some rules of that kind.

"Q. Well, nevertheless, in view of human infirmities and the infirmities attending the packing of food products, the Bureau of Chemistry has been compelled to recognize that they must grant some leeway, haven't they?

"A. Yes, and they have to take those things into consideration, necessarily; we all have to do that.

"Q. In order to practically carry on the business?

"A. Yes, sir." (B. Ex. pp. 67-68-69).

Counsel for the Government in their statement quote a portion of the opinion of the Court in the cause but do not quote the entire opinion. We refer the Court to the full opinion as found in the Bill of Exceptions at page 76.

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ARGUMENT

We shall, in the first instance, endeavor to present our argument in support of the correctness of the decision of the Lower Court and after doing so will attempt to answer such portions of

the brief of the Government as are not replied to in our original argument.

The action is predicated upon the sixth subdivision of paragraph 7 of the Pure Food Act (3 *Fed. St. An.* (2nd Ed.) 371-372), which reads as follows:

"Sec. 7. That for the purposes of this Act an article shall be deemed to be adulterated: * * * in the case of food * * * Sixth. If it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter." (34 St. L. 769.)

Section 2 of the Food and Drugs Act makes it a misdemeanor for anyone to introduce into interstate commerce or to offer for sale any adulterated foods. Section 10 of the same Act provides that the goods themselves shall be seized for confiscation by a libel or proceeding *in rem* when adulterated within the meaning of the Act. Two remedies are therefore vested in the Government by the Act—one by criminal proceedings against the person who handles the adulterated goods, and the other by an action *in rem* for confiscation against the goods themselves. The statute is therefore a penal statute in its nature and must

be strictly construed as all penal statutes must be where fines or penalties are imposed.

"A law which takes away one's property or liberty as a penalty for an offense must so clearly define the acts on which the penalty is denounced that no ordinary person can fail to understand his duty and the departure therefrom which the law attempts to make criminal, since one cannot be said to wilfully violate a statute which is so contradictory or blind that he must guess what his duty is thereunder." (*Brown v State*, 119 N. W. 338.)

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large."

James v. Bowman, 190 U. S. 127.

Interpretation of Subdivision Six of Section 7 of the Food and Drugs Act.

A careful examination of this section raises at once two questions—first, whether the Act is to be literally construed, and, second, if not, what test or standard is to be applied to determine the extent of the adulteration contemplated by the statute. We will first consider the application of a literal construction of the statute.

The statute provides that a food product is adulterated "if it consists in whole or in part of

a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food." The language is comprehensive. Literally construed it would prohibit the introduction into interstate commerce of any food product that contained any decomposed substance, no matter how slight. No one will deny that decomposition sets in immediately after the death of animals or fish. It may be slight in extent, but nevertheless, the decomposition exists and a literal interpretation of the language of the Act would prohibit the introduction into the trade of a food product containing the slightest percentage of decomposed matter or substance. Such a construction would render commerce in canned salmon, vegetable and meat products and similar commodities impossible. The purpose of the Act was to facilitate and make safe such commerce in such commodities. The application of a literal construction would tend to prohibit the introduction of such products into the trade between the states and foreign countries. The purpose of the Act by such an interpretation would therefore be frustrated.

Under this provision the Government sought to confiscate 1038 cases of Tabasco Flavor Catsup in the United States District Court for the

Eastern District of Missouri. (Service and Regulatory Announcements of the Department of Agriculture, page 395.) In his instructions to the jury in that case, Judge Pollock discussed at considerable length the proper interpretation of subdivision six, and said:

"Now, the precise charge made in the complaint for libel is this: That for the purpose of this act, or article in the law—it says to be adulterated, in the case of food; then, paragraph 6—'If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of any animal unfit for food, whether manufactured or not, or if it is a part of a diseased animal, or one that has died otherwise than by slaughter.' Now the defendant in the case denies adulteration in the matter charged in this food product, tomato catsup, and thus the matter is fought. At the trial here the real contention and complaint of the Government is, not that there was, in the catsup that was said to be condemned, any putrid matter, because the word putrid, used in this section of the act, has application to animal matter, but it is that the tomatoes that were used by this company in the manufacture of this tomato catsup were decomposed, or rotten, in whole or in part, to such an extent as is violative of this section of the statute. There is no contention made here in this evidence that the plant, or, speaking plainer, this Tomato Products Company, was not kept in a reasonably cleanly condition, or that the vat or pipes through which this product was passing while it was being manufactured were allowed to become filthy and dirty so as to injure the product in that way, but it is as I understand the evidence adduced, solely and

alone on the facts that there was used in the manufacture of this catsup rotten tomatoes to such an extent as to violate this provision of the act.

"Now, gentlemen, that brings us of a necessity, to a determination of what the founders intended by the enaction of this provision. In certain other provisions there is used the term—for instance, in paragraph one of this section: 'If any substance has been mixed and packed so as to reduce, lower, or injuriously affect its quality or strength.' That is to say the law-making power laid down the test. In another provision down here, the law-making power placed another test on the matter, that is, 'if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health.' So, if this were a proceeding under the fifth paragraph and the inquiry was as to whether there was an adulteration of something else, and in such a manner as to make it deleterious to health—you will notice that the paragraph which we are following lays down no test whatever. Now, let me read it again: 'If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance.' Now, the Congress, in section six, based a reasonable application of this section to the practical business affairs of life. In such case the Congress intended that it should apply to the absolute term. For instance, supposing you were manufacturing pepper, and you would add to that pepper something that would not adhere to the pepper grain itself, this would be prohibitive; that is, Congress would make it prohibitive to add ground peas. And Congress assumed here that putrid animal flesh was not healthful and not good, so they prohibited it—the sale of putrid animal matter—and they also prohibited the use of decomposed vegetable matter in the manufacture

of food products. Now, of course, if this catsup was manufactured altogether out of rotten tomatoes it would not be regarded as fit for human beings to consume. If it was some substance that was not inherent to the tomato itself it could be easily prohibited in that case, and the prohibition there be easy. But the word, packages, here, with which we are principally interested, in this trial, is in its everyday use, not in the scientific sense. In the scientific sense wine or beer would be absolutely prohibited in this case; as you gentlemen all know the grain with which beer is made and the grapes with which wine is made are fermented.

"Again there are lots of food products that the Congress—made out of partially decomposed vegetable matter, in some instances at least—that the Congress didn't intend to prohibit. Many of us like a dish called youget that has gone through a process of decomposition. Again, take an article like sauerkraut; there is a certain stage of decomposition reached in there that the Congress did not mean. Again, you take cheese. In the ripening process decomposition has taken place and the Congress did not mean to prohibit the manufacture of it, or sauerkraut. On the other hand, Congress did not intend to prohibit the manufacture of cider. While it says 'in whole or in part decomposed,' no man could engage in the manufacture of cider because you might possibly make a bottle of cider or a gallon of cider that no part of it has been decomposed, but you could not engage in the manufacture of cider, because to find perfect apples that are not in part decomposed would be absolutely prohibitive of the making of cider. So, if we had to make tomato catsup out of tomatoes which were not in part decomposed we could never make any tomato catsup, because it would be a matter of impossi-

bility for anyone to engage in the manufacture of catsup, and there would be some decomposed tomato matter going into the product. The care with which you would have to conduct a business of that kind would absolutely prohibit the business. So, what the Congress meant—it meant this: that in the manufacture of tomato catsup, which is the subject of this, that the rule of reason should enter; that is to say, a *factory that exercised a reasonable, prudent caution in collecting the tomatoes and assorting those that went into the cylinder so as to cut out any, unreasonably so, of decomposed tomatoes*—the matter of a reasonably prudent, careful, and intelligent man, engaging in his affairs, would do—that he be protected under the law, unless he became careless in his business and allowed rotten tomatoes to go in there in a manner that a reasonable, prudent man, making a product for consumption of his own, would not do.

"The burden of proof is on the plaintiff in this case. It is admitted by the intervener that they did make and manufacture the product at their plant. The plaintiff in this case attempts to show that in the selection of the tomato from which this catsup was prepared, in this case, that the reasonable care and caution was not used, to keep out rotten tomatoes, that a man of ordinary care and prudence would use. If the Government has established that, you will then find that it is adulterated, and find for the plaintiff. If the Government has failed to establish that, you will find that it is not adulterated, and find for the claimant.

"I have tried to bring the attention of the jury down to what I deem, under this law, a crucial test case, in so far as a substance that might result in adulteration of a food product from

the very adherent food product itself. This is the first case that I have known to be tried under the law, and *as the law-body has not laid down a test, then of necessity the court must make a test*, and it is one of the primary rules with all laws, that they must be free, so that is what I am giving you to determine the facts in this case. * * * There have been certain requests in this case, to instruct to discharge. In so far as I have not given them, they will be treated as refused. It is a matter of considerable concern to the parties, and you will take it as such and determine from the evidence in the case and the manner I have indicated, whether or not *this food product is, or was, decomposed and filthy to an unreasonable extent, or to the extent* that a reasonably prudent, cautious, and diligent business man in the manufacture of a product to be consumed by his family wold not permit."

The Court in the tomato catsup case clearly reached the conclusion that the Congress could not have intended to have placed a ban upon the introduction into interstate commerce of all food products that had in them any decomposed or putrid matter. He declined to hold that the Congress ever intended to prohibit the introduction into trade between the states of any slight or reasonable amount of decomposed substances. Such an interpretation would annul the very purpose of the Act to regulate commerce in food products.

The Court in that case, therefore, held that subdivision six could not be literally interpreted

and he therefore adopted a liberal interpretation and applied to the statute the rule of reason and then proceeded to give it a liberal interpretation.

He held that the statute really meant, and was intended by the Congress to mean that no food products should be barred from introduction into interstate commerce unless they contained an unreasonable quantity or percentage of adulteration or of decomposed animal or vegetable substance. He applied as a standard or test the rule in the preparation of such products that an ordinarily prudent manufacturer would utilize in the conduct of his own business.

The effect of his decision was that the jury should find the claimant guilty if, in the judgment of the jury, the quantity of decomposed matter contained in the catsup was unreasonable in extent or amount. He left to the jury the determination of the reasonableness or unreasonableness of the decomposed matter and the determination of its adulteration within the meaning of the Act. In other words, it was left to the jury to use their own judgment as to what was reasonable or what was unreasonable.

As we have seen from the testimony of Dr. Balcom, who has been employed as an expert by

the Bureau of Chemistry for more than twenty years, no standard as to the percentage of decomposed matter had ever been adopted by the Bureau of Chemistry. Dr. Balcom also testified that it was an administrative and practical impossibility to literally construe the Act and prevent the introduction into commerce of food products containing decomposed or putrid animal or vegetable substance. Mr. Falknor, the attorney for the Government, stated in the trial that the Government claimed that no standard had ever been fixed and further stated that Dr. Balcom had so testified, which was true.

It is a fair inference from the testimony of Dr. Balcom and the other witnesses for the Government that subdivision six could not be literally construed and that the Department of Agriculture and the Bureau of Chemistry had so construed the Act. It also appears from the testimony that varying percentages of decomposed matter in canned salmon had been allowed by the Bureau of Chemistry to go into commerce—in some cases, five, six, seven, eight and ten per cent. and possibly larger percentages, all depending upon the exigencies of the condition at the time prevailing.

Manifestly this rule of action would not have prevailed in the Bureau of Chemistry had it not been that the Bureau recognized that the eating of such salmon was not injurious to human health. The fact that it was not injurious doubtless controlled the activities of the Bureau of Chemistry.

This view as to the absence of danger to health may have influenced the Bureau of Chemistry and it may account for its failure to adopt in any published regulation a particular standard as to what percentage of decomposed matter would bar the introduction of the food product into commerce.

It therefore seems to us that the courts and the Bureau of Chemistry have practically construed the Act to mean that a food product would not be allowed to go into commerce if it contained an unreasonable quantity of decomposed matter, but the Bureau has failed, according to the evidence, to establish any standard as to what would be a reasonable or unreasonable percentage of decomposed matter. In other words, the Bureau itself, as well as Judge Pollock have construed subdivision six to mean that an article of food is adulterated within the meaning of the Act, if in the opinion of the jury it contains an un-

reasonable quantity of putrid or decomposed matter, but such an interpretation, applying the standard of reasonable or unreasonable percentages of decomposed matter brings this case under the ban of numerous decisions of the Supreme Court of the United States. It is plain that subdivision six cannot be construed literally and that it must be given a liberal interpretation. The only liberal interpretation that can be applied to the Act is that of reasonableness adopted by Judge Pollock and if the standard or test of reasonableness be applied the provision of the Act becomes so vague and indefinite as to render it unenforceable.

Reasonable Standard or Test.

If the Act had incorporated in its provisions the standard of reasonable percentages as indicated heretofore, the Act would necessarily be held unconstitutional by the courts. The standard of reasonableness in a penal statute is with practical unanimity held by the courts to be no adequate standard or test. Under such a test different juries would interpret reasonableness according to their individual views and the result would vary with different juries or courts. The manufacturer of salmon is entitled to know in advance under a penal statute the extent of the adulteration that

will prohibit the introduction of his goods into commerce. A conviction based upon the standard of reasonableness renders the Act too vague and uncertain for enforcement.

In the case of *United States v L. Cohen Grocery Co.* (255 U. S. 881, 41 Sup. Ct. Rep. 298), the court had under consideration the provision of the Lever Act making it unlawful for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries. In its opinion, the Court said:

"The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words 'that it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or ade-

quately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction, finds abundant demonstration in the cases now before us, since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed. As illustrative of this situation we append in the margin a statement from one of the briefs on the subject. And again this condition would be additionally obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution."

The reasoning of the Court in its construction of the Lever Act applies with controlling force in this action. Numerous other courts, both state and federal, have applied the rule announced in the *Cohen Grocery Co. case* and have refused to sustain convictions under statutes providing no other standards than that of reasonableness.

In the case of *Cook v State* (59 N. E. 489) the Supreme Court of Indiana refused to sustain

a conviction under a statute which made it an offense to haul over turnpikes and graveled roads in specified weather loads over 2,000 pounds in narrow-tired wagons, or of more than 2,500 pounds in broad-tired wagons. In its opinion, the Court said:

"The language of a criminal statute cannot be extended beyond its reasonable meaning, and, wherever the court entertains a reasonable doubt as to the meaning, the doubt must be resolved in favor of the accused. The court must expound what it finds written, and cannot import additional meaning without sufficient indication thereof in the words of the statute, with such aids thereto as the established rules of law authorize."

And the Court further said:

"There must be some certain standard by which to determine whether an act is a crime or not; otherwise cases in all respects similar, tried before different juries might rightfully be decided differently, and a person might properly be convicted in one county for hauling over a turnpike in that county, and acquitted in an adjoining county of a charge of hauling the same load, on the same wagon, over a turnpike in like condition in the latter county, because of the difference of conclusions of different judges and juries based upon their individual views of what should be the standard of comparison of tires, derived from their varying experiences, or the opinions of witnesses as to what difference of width of tires would constitute one wagon a narrow-tired wagon and another wagon a broad-tired wagon. If it should be said that the question as to what is a

narrow-tired wagon is one which may be determined in a particular case by the jury trying it, under proper instructions from the court, can we hold that the court in its instructions could lay down any principle or rule which would obtain in all such cases throughout the state? If so, can this court indicate what should be the scope or tenor of such instructions?

"The phrases 'narrow-tired wagon' and 'broad-tired wagon' are not technical phrases, having a peculiar and appropriate meaning in law, and they are to be taken in their plain or ordinary and usual sense. Thus taken, a 'narrow-tired wagon' means a wagon having wheels with tires which are narrow, while a 'broad-tired wagon' means a wagon having wheels with broad tires. If tires of particular widths be compared, it is easy to say which is comparatively narrow and which is comparatively broad, but without any prescribed standard it is impossible to say, as a matter of law, that a tire two inches wide is certainly either a narrow tire or a broad tire. Looking at the contents of the affidavit, and at the language of the statute under which it purports to proceed, we are unable to say that the facts stated in the affidavit certainly constitue a criminal offense."

The following cases announce the same doctrine:

Hayes v State, 75 S. E. 523;

Howard v State, 108 S. E. 513;

Griffin v State, 218 S. W. 494;

Russell v State, 228 S. W. 566;

State v International Railway, 165 S. W. 892;

State v Satterlee, 202 Pac. 636;
State v Lantz, 111 S. E. 766;
Tozier v United States, 52 Fed. 917.

It is our contention that this Court must hold that subdivision six cannot be literally interpreted without frustrating the purposes that Congress had in view in passing the Act. If the subdivision cannot be literally construed, we have assumed, as Judge Pollock did, that the reasonableness of the amount of decomposed matter must be read into the Act to establish a standard to determine the requisite extent of the adulteration, and if we do adopt the standard of reasonableness, then under the *Cohen Grocery Co. case* and other cases, it necessarily follows that such an interpretation would render the Act unconstitutional and void and no conviction thereunder can be sustained and no judgment of conviction can be upheld as the statute is penal in its nature.

But as was said in the case of *Cook v State*, 59 N. E. 489, nothing can be imported into a statute imposing fines or penalties.

No Standard Authorized.

There is no provision in any other section of the Food and Drugs Act authorizing the Depart-

ment of Agriculture or the Bureau of Chemistry to fix any standard for the determination of the extent of the adulteration under the provisions of subdivision six. Section three of the Act authorizes the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor to make uniform rules and regulations for carrying out the provisions of the Act, including the collection and examination of specimens of food. Section four authorizes the Bureau of Chemistry to make examinations of specimens of foods for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of the Act. It is questionable whether the Bureau of Chemistry or any of the Departments are empowered to fix a standard to determine the extent of adulteration which would prohibit the introduction of food products into commerce.

NO STANDARD FIXED BY BUREAU OF CHEMISTRY.

We have seen, however, that the Bureau of Chemistry has not adopted, or attempted to adopt any standard in relation to subdivision six, but if it be held that the Bureau of Chemistry has the power to adopt a standard for the en-

forcement of this subdivision, it is plain that it must have done so before this salmon was introduced into commerce. Statutes are not construed to operate retrospectively unless the language expressly so indicates. Plainly the Bureau would not have the power after the introduction of the salmon into commerce to adopt a standard to operate retrospectively.

What Sort of Instructions to a Jury Could Be Given.

If the Lower Court had submitted this case to the determination of the jury, we inquire what sort of instructions could the Court have given? He would have certainly been compelled to tell the jury that the Act could not be literally construed. The only other interpretation that he could have given would have been to have advised them as to the standard of reasonableness, which we have heretofore discussed. But such instructions would have been clearly in conflict with the decision of the Supreme Court in the *Cohen Grocery Company case* in its interpretation of the Lever Act. It would have been the duty of the Court to have interpreted to the jury the provisions of subdivision six. It is impossible to conceive how he would have done so. The jury could not

be permitted to adopt a standard and then find that such standard has been violated. The adoption of a test of comparison in a criminal statute or a statute imposing penalties is a legislative function, which under certain circumstances, we think may be delegated but this Act does not provide for such delegation to the Bureau of Chemistry to fix the standard, and even if it did the evidence is conclusive that no standard has ever been fixed by that Bureau.

For the reasons before presented, it is our contention that the decision of the Lower Court is correct and should be affirmed.

Judge Cushman's Decision.

The reasoning of the Lower Court, as set forth in its opinion (B. Ex. 76) construing certain other provisions of section seven of the Food and Drugs Act is unanswerable. Section seven provides:

"That for the purposes of this Act *an article* shall be deemed to be adulterated * * *

"Sixth. If it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, etc."

He says:

"I still adhere to the view that the 'article' of the statute is the single can of salmon, just as much so as if you had a herd of cattle, a part of which were tubercular and the rest were not; a single head of stock would be the article; we would not conclude that the entire herd of cattle were to be destroyed because ten per cent. or twenty per cent of them were tubercular. There you have means of testing the individual animal, but the great inconvenience that arises by reason of the nature of a can of salmon in testing it by any means known has brought about this attempt to fix a standard."

Again he says:

"This law directs that an article in whole or in part decomposed, putrid or—I have not the language before me, but the Court ruled that that does not apply; that it applies to bulk articles where there is a certain percentage of the entire mass that is putrid, but it does not apply to where a percentage of separate articles, such as cans of salmon, are part of them impure; that it does not give the Court any authority to destroy the good cans of salmon. Where an article in bulk, like liquid or a mass, is wholly impure, or partly impure, you can treat the whole of it as one thing, but you are not warranted, in law, in treating separate cans of salmon as one thing." (B. Ex. 80.)

Section seven uses the singular of the word "article." It does not say "articles of food" or "specimens of food" or "food products." The language used is plain and unambiguous. It re-

quires no construction or interpretation. Congress, in section seven, undertook to define adulterations for the purposes of the Act. Even though it might be conceded, which we do not concede, that other provisions of the Act might indicate that food products were intended, still the specific definition contained in section seven expressly states that that definition is to apply for all provisions of the Act. General provisions must always give way to specific provisions. Nothing can be imported into a statute imposing penalties or confiscating property. A penal statute must be construed strictly in favor of the accused. The purport of a statute can never be extended to make penal that which is not expressly set forth in the statute. Congress alone has the power to make an Act unlawful. To make an Act unlawful is a legislative function.

The Supreme Court of the United States in the case of *McDermott v Wisconsin* (228 U. S. 115, 33 Sup. Ct. Rep. 432) reached the same conclusion as did the Lower Court in construing the word "article" or "package" in section seven of the Food and Drugs Act, saying:

"That the word 'package' or its equivalent expression, as used by Congress in sections seven and eight in defining what shall constitute adul-

teration and what shall constitute misbranding within the meaning of the Act, clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. And it is sufficient for the decision of these cases, that we consider the extent of the word "package" as thus used only, and we therefore have no occasion, and do not attempt to decide what Congress included in the terms 'original unbroken package' as used in the 2d and 10th sections, and 'unbroken package' in the 3d section. Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming *at the contents of the package as it shall reach the consumer, for whose protection the Act was primarily passed,* and it is the branding upon the package which contains the article intended for consumption itself which is the subject-matter of regulation. Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed.

"The object of the statute is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food, and in order that its protection may be afforded to those who are intended to receive its benefits, the brands regulated must be upon the packages intended to reach the purchaser. This is the only practical or sensible construction of the Act, and for the reasons we have stated, we think

the requirements of the Act as so construed clearly within the powers of Congress over the facilities of interstate commerce, and such has been the construction generally placed upon the Act by the Federal Courts."

This case strongly supports the view of the Lower Court as to the construction of the word "article" and should be controlling upon this Court. It also answers the contention of counsel for the Government in its references to sections 2, 3 and 10, as bearing upon the interpretation of the word "article" and shows the fallacy of such argument in contending that the word "article" should be construed in the generic sense and meaning "food products."

If the word "article" be construed to mean "food products" how should it be applied in the case of salmon? If the can is not the unit, what is the unit? Is it the case containing 48 cans, or is it the parcel, or is it the product or any particular cannery or of all the canneries owned by a packer? Many packers put up annually hundreds of thousands of cases of salmon. Is the whole product to be condemned and confiscated if a single can or case of salmon happens to be adulterated? Must a million cases of salmon be destroyed because ten per cent. or twenty per

cent. may inadvertently have decomposed or putrid matter in them, remembering always, that the tainted or putrid salmon is not injurious to health and bearing in mind further, as shown by the testimony in this case, that any person whose sense of smell is unimpaired can easily detect the odor and determine for himself whether the can is adulterated. Salmon is packed in Alaska and distributed throughout the United States and foreign countries. If one car is seized and found to be adulterated, will this justify the confiscation of other cars of salmon in which no decomposed matter exists? Yet if all of the salmon were shipped to Seattle or San Francisco in one parcel, the contention of counsel for the Government would justify the seizure of the entire output of any particular packer.

Moreover protection of the ultimate consumer is the real purpose of the Act and both upon reason and authority it would seem that the container that reaches the retail consumer is the thing that Congress had in mind in using the word "article."

Dr. Hunter testified that in his judgment 400 cases of the salmon involved in this controversy were adulterated but he said that the other re-

maining 1600 cases were marketable salmon and fit for human consumption. (B. Ex. 53.)

The Lower Court further stated that:

"The exigencies of the case, the danger to the public if the impure article is poisonous, might justify the banning of the entire number of articles and give reason and plausibility to a ruling that that was the intent of Congress. I conclude it does not warrant the court in concluding, in the absence of positive language leaving no room for doubt, that it was the intent to destroy sixteen hundred cases of good salmon out of a total of two thousand cases."

Evidently the fact that 1600 cases was admitted to be marketable salmon, free from adulteration, influenced the Lower Court in his decision, and he was further influenced by the fact that it was admitted by all of the witnesses for the Government that any inexperienced person could readily detect the putrid or tainted cans and of course would not eat the contents. In all packs of salmon occurs a small percentage of swelled cans due to the introduction of air into the can. The ends of the can puff out so that it is easy to detect them. We venture the assertion that no prosecution has ever been brought against a packer for introducing into commerce swelled cans. The reason is apparent—the consumer can detect

them and will avoid consuming them. Under the evidence in this case it is conclusively established by the Government's own witnesses that an ordinary housewife opening a can of tainted salmon could not help but detect its quality and therefore reject it.

In the case of *United States v 1379 Cases of Canned Salmon*, in the United States District Court for the Western District of Washington, Judge Cushman had occasion to pass upon the identical question involved in this case. In the course of his opinion he says:

"Now, that word 'article'—Judge Sessions found some trouble in construing 'consists of' or 'consists'—that word 'article,' I find fully as much trouble with as Judge Sessions did the other. Now, salmon is an article of food, but because some cans of salmon are found to be putrid, does not warrant the entire salmon output being condemned. A can of salmon is an article, but is the output of one cannery for a season an article, or is the shipload of salmon an article or half of the output of a cannery an article? I can't agree with any such construction. It would be reasonable to conclude, in the light or the purview of this Act—possibly you could construe the output of a cannery to be an article if the evidence showed that all of the output of the cannery was subjected to those conditions that rendered the part that you found to be putrid or filthy, but it seems like instead of this being in part putrid or filthy, that a part of it is putrid or filthy. If a very small percentage of the con-

tents of each can was filthy, even a very very small portion of it, that would condemn the whole lot, but because part of the cans are found to be filthy and putrid, I am unable to conclude that the court would be warranted in condemning the entire lot of these cases of salmon. Now, if Congress does intend that the courts should give that construction to this law, a definition would clear the matter up.

"Now, I find that instead of the entire output of this cannery having been subjected to conditions that caused this putrescence—this filth in certain of the cans—it is more reasonable to conclude that these old salmon that got into this pack were the salmon, as pointed out by the prosecutor, that they picked up locally when they were short of fish to complete the day's output or whatever reason there was, without knowing their age, and not those that Mr. Hansen went out to the fishing grounds and got from the purse seiners. That being true, why, the output of the cannery for those days on which they purchased these old fish would contain putrid fish. If you are going to construe 'article' as limited to the condition that created the putrescence, why, then you are going to limit it to those days and the output on those days when they did buy such fish, and not the whole season's pack. If the Department wants to make rules that these salmon canners shall can and keep their cans separate, and put one day's pack up separate from another, and not mix up the cans of the separate days' pack and thereby render—put themselves in the position to test and sample cases canned on a particular day when they might bring in a scowload of old fish, why, the public would be protected, and the commercial end of it would not be jeopardized by incurring the destruction of a large amount of fish that might

have been canned on days when they were getting perfectly fresh fish. I can see very readily how one scowload of fish if it was canned and thrown into a shipload and brought in from Bering Sea and samples were taken from that one scowload all canned on one day would show up a percentage high enough to condemn the whole shipload if we are going to adopt that rule and enforce it that the government seems to ask in this case." * * *

"Now this statute does not give the Court any warrant or does not give the Department, so far as I see, any warrant to fix a proper percentage of filth. It says 'in part.' One decision you read said that meant substantial part, and if it was where human excrement entered into oysters that I take must have been taken up from the mouth of a sewer some place, so small a percentage as could only be detected by a microscope, I believe would be a very substantial portion. But I don't find any warrant under a forfeiture—how would anyone instruct a jury where your articles, like cans of salmon, are separate? They are separate articles; the cases are separate.

"So far as health and comfort are concerned—that part of the law regarding misbranding is to prevent fraud being committed upon the consuming public—but the other part, keeping filth and putrescence out of it—that was not to prevent a fraud; that was to protect the public in the matter of its comfort if not health; and the more rotten the salmon was, the less liable you would be or the more liable you would be to be disgusted by it as a food, because you would be warned in the kitchen before you ever got it to the table; but a very small bit, the smaller the portion of putrescence, the more likely you would be to get it on your table."

Further in his opinion Judge Cushman said: (B. of Ex. 76.)

"I see no application either of the candy case or the syrup case or the oyster case to this. In the matter of the candy and in the matter of the syrup and in the matter of the oysters, there was a reasonable presumption of a fact or something in the nature of an issue of fact to submit to the jury. The jury might reasonably conclude that the oysters' feeding ground, where the oysters had been gathered, being, as I understand that case, the same feeding ground, that each oyster fed on substantially the same product, and in the samples of the oysters taken each of them showed some varying amount of impurity—the jury would certainly be justified in concluding that all the other oysters, not samples and not tested, would likewise contain a certain amount of impurity and render them unfit for food under this law. So in the case of the syrup, where it was labeled 'Maple' syrup, the cupidity of the manufacturer having induced him to label as maple syrup certain portions of a shipment that were not in fact maple syrup, the jury would be warranted in applying what they knew about human nature—the doctrine of, if false in one, false in all; that if the seller of the maple syrup was cheating and deceiving the public in the cans that were sampled, they would be justified in concluding that in the other cans so labelled but not sampled he was likewise cheating and defrauding the public by misbranding those. I am not entirely clear about the candy case, but I take it that that comes under the same rule."

This extract from Judge Cushman's opinion seems to distinguish the greater number of cases

cited by counsel for the Government upon the meaning of the word "article." The Court will remember that there is no evidence of any improper methods used in the packing of this salmon, nor in the manner of handling the fish or acquiring them. There is no evidence of any fraud on the part of the packer. There is no evidence that there was any willful mingling of partly decomposed fish with fresh fish, and neither is there any evidence of any fraudulent mingling by the packer of the defective cans with the balance of the parcel involved in this controversy.

On page 29 of the brief of plaintiff in error, it is said:

> "If the interpretation placed on the word 'article' by the court below in the case at bar is allowed to stand, it will necessitate a radical revision of the procedure under the Food and Drugs Act, procedure which has been in use throughout the various District Courts since the passage of that Act."

But this is no argument in support of counsel's construction of the statute. Under the Lever Act scores of prosecutions were enforced and convictions obtained by numerous Federal Courts. The fact that the Act had been erroneously interpreted by the Federal Courts had no influence upon the Supreme Court of the United States in holding the

law unconstitutional for the reason that the standard of reasonableness was incorporated in the Act and which was not a proper standard. The Supreme Court has, however, in the case of *McDermott v Wisconsin*, held that the can which is the article that reaches the consumer was what Congress intended by the passage of this Act. After the decision in the McDermott case it would seem that the Bureau of Chemistry should have modified its procedure to conform to the requirements of that decision. The inconvenience to the Bureau of Chemistry is certainly no reason for importing into a penal statute something that is not there. If it is the desire of Congress to give any other definition to the word "article" the Act can be easily amended.

On page 31 of the brief the contention is made that over 100 cans of the various samples examined were tainted and that as to these cans the Court should have submitted the case to the jury. Such a contention is absurd in view of the fact that the cans that were opened and found defective were immediately destroyed and could not be before the Court.

On page 33 of the brief, counsel says:

"In order for the Court to reach the deter-

mination that some 1600 cases of the parcel of salmon seized were unadulterated, it was obviously necessary to pass on a question of fact which was properly one for the jury. It was not admitted by the claimant that 400 cases of the product was bad, and it was not testified to by any of the Government's witnesses that 1600 cases of the product were unadulterated. The assumption on which the ruling was based could only be arrived at by a series of deductions which only a jury could rightfully make."

Dr. Hunter testified, as we have before stated, that 1600 cases of this salmon was marketable salmon and fit for human consumption. Counsel was therefore mistaken in saying that there was no evidence to support the finding of the Court. It was testified to by one witness for the Government and not denied by any of the others. Only one witness—Hansen —examined 384 cans, or 7 cases. The other witnesses examined 240 cans or 5 cases. It is therefore clearly established that not to exceed 7 cases were examined by any of the witnesses for the Government. Dr. Hunter's statement that 400 cases were bad was based upon the deduction that he drew from the examination of the 5 cases, but as a matter of fact, the record clearly shows that only one of the Government's witnesses examined 7 cases and the others only 5 and upon such examination and its results the

Government is seeking to destroy 1974 cases of salmon. The Court was well within the evidence in holding 1600 cases of the salmon to be marketable under Dr. Hunter's testimony. Under the facts in the case the uncontradicted testimony shows that the whole of the 1974 cases were sound with the exception of not to exceed 7 cases, which had already been destroyed.

On page 36 of counsel's brief, he refers to section 10, and particularly to the provision for the giving of a bond and the redelivery of the articles to the claimant conditioned that they shall not be sold or otherwise disposed of contrary to the provisions of the Act. In commenting upon this section, counsel says:

"It will be seen that ample provisions were made by Congress for just such a contingency as would have faced the Court below after a verdict. The seized goods could then have been taken down under bond for sorting or reconditioning, the burden remaining where it originally rested—with the claimant—to see that the goods were properly reconditioned and that they were not sold in violation of the terms of the Food and Drugs Act."

There is nothing in section 10 that authorizes the reconditioning or sorting of the salmon and we fail to see how this provision aids counsel in support of his contention. There is no evidence

that the claimant in this case, in any event was able financially to furnish a bond in compliance with the provisions of the Act. Moreover, the statute makes it optional with the claimant whether the bond shall be given. His property ought not to be confiscated merely because he might have a remedy by putting up a bond and reconditioning the goods.

On page 37 of the brief of the plaintiff in error, counsel says:

"It is also a well established rule that where one fraudulently, wilfully or wrongly intermingles his goods with those of another so that there is no evidence to distinguish the goods of the one from those of the other, the wrong-doer forfeits all of his interest in the mixture to the other."

This record fails to show any fraudulent, willful or wrongful intermingling of adulterated cans with the good cans. No evidence was offered as to any improper methods either in the packing of the salmon or in the procuring of the fish that were canned. Fraud can never be presumed. It must be established by competent evidence. There is no presumption of fraud. It must be proven. This record wholly fails to show any fraud on the part of the packer or the claimant. The salmon were packed by the Alaska Herring & Sardine Co.

and purchased by A. O. Andersen & Co. It is ridiculous to contend that A. O. Andersen & Co. could be guilty of any fraud in intermingling the goods. It is inconceivable that the claimant would have purchased adulterated goods if it had known it, nor is there any evidence in the record to show that the 7 cases of salmon examined became a part of the pack of the cannery in any other than an innocent and inadvertent way. The salmon that supply the canneries are to a considerable extent purchased from fishermen. It is impossible for anyone to determine, we assume, how long a salmon has been out of the water. The packers we understand, usually endeavor to pack the salmon within forty-eight hours after they are caught. It is conceivable that the packer was misled as to the time that the fish had been out of the water. Counsel cite in support of their contention the case of *Hentz v The Idaho*, 93 U. S. 586. In that opinion the Court says:

"It is admitted the general rule that governs cases of intermixture of property has many exceptions. It applies in no case where the goods intermingled remain capable of identification, nor where they are of the same quality or value; as where guineas are mingled, or grain of the same quality. Nor does the rule apply where the *intermixture is accidental, or even intentional, if it be not wrongful.* But all the authorities agree that

if a man wilfully and wrongfully mixes his own goods with those of another owner, so as to render them undistinguishable, he will not be entitlted to his proportion or any part of the property. Certainly not, unless the goods of both owners are of the same quality and value. Such intermixture is a fraud. And so, if the wrong-doer confounds his own goods with goods which he suspects may belong to another, and does this with intent to mislead or deceive that other, and embarrass him in obtaining his right, the effect must be the same."

In the absence of proof of fraudulent intermingling of adulterated cans with good salmon, the presumption that such intermingling was accidental must prevail.

On page 39 of counsel's brief it is stated:

"The Food and Drugs Act when read as a whole, also supplies a convincing argument against the court's ruling. Section 2 plainly prohibits the introduction into any state from any other state any article of food which is adulterated and stamps the act of shipping or delivery for shipment from one state to another as a misdemeanor. It could not be said that the shipper in the present case had not shipped adulterated canned salmon and it is the theory of the Government that the Act, in section 10, provides an alternate method of procedure based on the same violation of the Act as that described in section 2. Is it logical to say, in view of the plain violation of section 2, that the same goods when attacked under the provisions of section 10, are not liable to condemnation and forfeiture?"

The answer to this argument is perfectly apparent. Only 7 cases of salmon or 384 cans were examined and found defective. Common experience and the record both disclose that the cans that were examined were destroyed. How could the cans that have been destroyed be confiscated by the judgment of the Court? They were already destroyed. This is not a proceeding against the shipper for the introduction of the salmon. This is an action *in rem.* That would be a criminal action against the shipper, which is totally foreign to the issues involved in this case.

On page 40 of the brief of plaintiff in error, it is stated:

"A construction should not be applied to a statute which renders it inoperative and which negatives the avowed purposes of the Act."

Under counsel's contention it would be the duty of the courts to uphold all acts of Congress whether or not such acts contravene any constitutional provision. It is usually possible to ascertain from the reading of a statute its purposes. Under counsel's statement, it would be the duty of the Court to uphold the Act even though it was unconstitutional.

It was easy to ascertain the purpose of the Lever Act. Yet the Supreme Court, in the *Cohen Grocery Company case*, unhesitatingly held it void. If subdivision six of section 7, as construed by the Bureau of Chemistry, deprives the claimant of any of his constitutional rights we think it would be the duty of the Court to unhesitatingly set it aside. This is true, particularly of a statute imposing penalties. As we have seen, nothing can be imported into the Act to establish a crime or to sustain a conviction that is not inherent in the Act itself.

We have referred specifically to only a few of the contentions of counsel for the Government set forth in his brief but in our main argument we think that we have sufficiently answered such contentions. We earnestly contend that the judgment of the Lower Court is correct and should be affirmed.

Respectfully submitted,

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